

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

77-6172

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

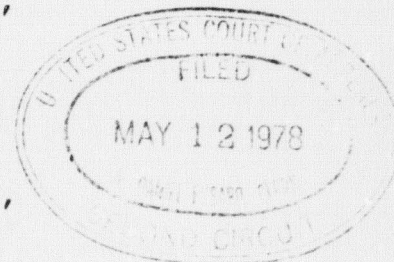
AMERICAN CYLINDER MANUFACTURERS COMMITTEE,

Plaintiff-Appellant,

-v-

DEPARTMENT OF TRANSPORTATION, BROCK ADAMS,
as Secretary of Transportation, JOHN J.
FEARNSIDES, as Acting Director, Materials
Transportation Bureau, ALAN I. ROBERTS, as
Acting Director, Office of Hazardous Mate-
rials Operation, and ENGINEERING PRODUCTS
OF CANADA, LTD.,

Defendants-Appellees.



PETITION OF PLAINTIFF-APPELLANT
AMERICAN CYLINDER MANUFACTURERS COMMITTEE
FOR REHEARING AND REHEARING ~~IN~~ BANC

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May 12, 1978

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-6172

AMERICAN CYLINDER MANUFACTURERS COMMITTEE
Plaintiff-Appellant,

v.

DEPARTMENT OF TRANSPORTATION, BROCK ADAMS
as Secretary of Transportation, JOHN J. FERNSIDES,
as Acting Director, Materials Transportation Bureau,
ALAN I. ROBERTS, as Acting Director, Office of
Hazardous Materials Operations, and ENGINEERING
PRODUCTS OF CANADA, LTD.,
Defendants-Appellees.

PETITION OF PLAINTIFF-APPELLANT
AMERICAN CYLINDER MANUFACTURERS COMMITTEE
FOR REHEARING AND REHEARING IN BANC

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure,
the American Cylinder Manufacturers Committee (ACMC) respectfully petitions this
Court for rehearing of the above-captioned appeal. On April 28, 1978, the Second
Circuit, per Judges Mansfield, Moore and Smith, affirmed the decision of the United
States District Court for the Southern District of New York (per Pollack, J.) which
dismissed the complaint by ACMC challenging the Department of Transportation's

("DOT's") procedures for issuing "approvals" to test and analyze compressed gas cylinders outside the United States. ^{1/} Judge Pollack's opinion did not address the central legal issues in this case - whether DOT's general rulemaking authority empowers it to issue these approvals. Judge Pollack held only that a different section of the relevant enabling statute did not apply. As a result, this Court's opinion did not rely upon the opinion of the district court. ACMC respectfully submits that the Second Circuit's decision in this case is based upon a clear error of law. The grounds for this petition are set forth below.

SUMMARY OF THE GROUNDS FOR THIS PETITION

1. The Conclusion That DOT's Approvals Are Not Licenses Is A Clear Error Of Law Which Conflicts With A Prior Decision Of This Court.

This Court based its decision upon a determination that the "approvals" issued by the Department of Transportation (DOT) to inspect or test compressed gas cylinders in a foreign country are not "licenses" within the Administrative Procedure Act ("APA") definition at 5 U.S.C. §551(8). This finding is a clear error of law which contradicts prior decisions of this Court.

The APA defines a license as "the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission." " ' Licensing' includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, limitation,

^{1/} This Court's opinion, which was issued on April 28, 1978, is appended.

amendment, modification or conditioning of a license." (Emphasis added) 5 U.S.C. §551(8),(9). The legislative history of these sections supports a broad construction of the terms license and licensing. The Senate Report on the APA states that a license is defined to include "any form of required official permission . . . " S. Rep. No. 752, 79th Cong., 1st Sess. (1945), as reprinted in Pike and Fischer, 'Administrative Law', Second Series, Desk Book, (hereinafter: "Pike and Fischer") at Stat.-21. Likewise, the House Report contains this same language and states that the definition of licensing was "included because licenses take many forms . . . " (Emphasis added) H. Rep. No. 1980, 79th Cong. 2d Sess., (1946), reprinted in Pike and Fischer at Stat.-64. The issue of whether these DOT approvals are licenses was not briefed by the parties because DOT conceded that these approvals are licenses (as alleged in ACMC's Complaint, ¶14, JA 3). DOT explicitly stated in its brief in the district court, for example, "The approvals are in the nature of licenses as that term is used in the APA, 5 U.S.C. §551(8)".^{2/} In addition to DOT's having conceded the point, District Judge Milton Pollack also acknowledged throughout his opinion that these approvals are licenses.^{3/}

This Court has held in New York Pathological & X-Ray Laboratories v. Immigration and Naturalization Service ["INS"], 523 F. 2d 79, 82 (2d Cir. 1976) that:

^{2/} Further examples of the Government's concessions on this issue will be discussed below.

^{3/} Various instances in which Judge Pollack acknowledged that these approvals were licenses also will be discussed below.

The status of aliens admitted into the United States is subject to regulations promulgated by the Attorney General. By force of such a regulation (8 C.F.R. §234.2) a clinic, like New York X-Ray, that is not approved by the INS is not permitted to conduct the medical examinations. This fact is conclusive on the point that such approval is, in essence, a governmental license to perform such tests.

Judge Moore, in his dissent, agreed with the majority that the term "license" as used in the APA is to be broadly construed:

Admittedly, the approval of a limited number of facilities in this case probably constitutes a 'license' under the broad definition of that term contained in 5 U.S.C. §551(8).

Just as the fact that clinics not approved by the INS could not conduct medical examinations was conclusive in New York X-Ray on the issue of whether such approvals were licenses, the fact that cylinder manufacturers not approved by DOT cannot ship cylinders to the United States is likewise conclusive.

The general rulemaking section of the Hazardous Materials Transportation Act ["HMTA"] relied upon by the Court to permit DOT to issue such approvals does not empower DOT to do so. See 49 U.S.C. §1804(a). Avoiding use of the term "license" to justify reliance upon §1804(a) of the HMTA is, to use this Court's words, "an exaltation of form over substance." Slip. op. at 2850. Regardless of the label used, these approvals are sanctions to which §558(b) of the APA applies because a foreign cylinder manufacturer not approved by DOT cannot ship cylinders to the United States.

The APA, 5 U.S.C. § 558(b), requires that for DOT to prevent shipment of cylinders without prior approval, it must have specific statutory authority to invoke this sort of sanction: "A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law."^{4/} Because DOT has no statutory authority to issue this sort of sanction privately, to the extent that these regulations purport to confer such authority they are invalid.

2. Public Policy Considerations Favor Affording the Opportunity for Public Comment.

In assessing the impact of affording the public the opportunity to participate in DOT's approval procedures, the Court stated:

The public interest will not be well served by needlessly prolonging agency proceeding and adding unnecessary costs to the implementation of DOT's procedures created to meet the changing needs of the industry especially where, as in this case, there is no threat to the public safety. Slip. op. at 2854-55.

Public policy considerations support ACMC's contention that the issuance of these approvals must be accompanied by public participation. The right of public participation would inhere to everyone, not merely competitors in the American cylinder industry. Such diverse concerns as cylinders users, importing companies and public interest groups would have the opportunity to comment meaningfully; and there is nothing in the record which indicates that DOT would be inundated by comments concerning every prospective licensee. DOT merely

^{4/} The legislative history of 5 U.S.C. § 558(b) will be discussed below.

would have to read any comments submitted on applications of particular interest to a member of the public. The burden is slight; the potential benefit is substantial (see below); and there is nothing in the record which substantiates the finding that the opportunity for public comment would be costly. Any actual threat to safety has been shielded from the public eye because DOT has heretofore issued licenses without public notice, thus preventing the public from knowing the degree of risk imposed by DOT's licensing process.

SUMMARY OF PERTINENT FACTS

Compressed gas cylinders have been regulated by the United States government since 1922 because defective cylinders can be extremely dangerous. Judge Pollack found that both ACMC and the Compressed Gas Association, the organization through which the cylinder industry transmits much information to DOT, have "participated as a friend of the governmental agency [DOT] in all phases of its regulatory activity, including rulemaking, licensing proceedings, industry suggestions on construction, specifications, safety matter and others." (Emphasis added) JA 127-28. The new regulations, 49 C.F.R. §§173.300a and b, set forth a licensing program for foreign manufacturers and independent inspectors coupled with special requirements for foreign manufacturers to ensure that they can and will comply with DOT's cylinder specifications. They require that a foreign cylinder manufacturer obtain an approval before it can ship cylinders to the United States. There are separate application procedures for inspection agencies and manufacturers.

The applicant-inspection agency must state its name, address, principle business activity, telephone number, and description of each ownership interest greater than three percent. The applicant must "set forth a detailed description of the inspection and testing facilities to be used", describe its capability to perform the inspections and tests, name and describe the qualifications of the individual inspectors, designate an agent for service of process in the United States, and agree to allow DOT to inspect its premises.

The application for manufacturers is similar except that the manufacturer must describe its facilities and the specifications of the proposed cylinders and identify the independent inspection agency to be used. As Alan I. Roberts, Director of DOT's Office of Hazardous Materials Regulations [OHMO], described:

A foreign manufacturer who conducts tests and analysis outside the United States, in addition, to using an approved inspector, must himself be approved by the Department. Even if he avoids submitting himself to the Department's approval examination by conducting tests and analyses within the United States, he still cannot manufacture cylinders without using an independent inspection agency approved by the Department, which approval will involve an examination of his manufacturing site by the Department. (Emphasis added)

Affidavit of Alan I. Roberts, ¶9 JA 30a.

The approval regulations impose additional requirements on foreign manufacturers to ensure compliance: appointment of an agent for service of process in the United States to ensure exposure to civil or criminal action under the HMTA and to product liability suits (41 Fed. Reg. 18413-14; JA 8-9); unannounced access by DOT to the manufacturing/testing site (41 Fed. Reg. 18415; JA 10); and "other terms and conditions as [DOT] considers necessary

(49 C.F.R. §173.300b(d); JA 10) which in the license at issue includes the use of special cylinder markings.

For both manufacturers and inspectors, the regulations state that DOT will grant or deny its approval "on the basis of information submitted in the application and [its] own investigation. 49 C.F.R. §173.300a(b) and 173.300b(d); 41 Fed. Reg. 18413; JA 8-10. The decision whether to grant or deny such an application rests with DOT's discretion. DOT can inspect the manufacturer's facilities if it chooses, but there are no objective criteria written into the regulations to be applied by the agency in exercising its discretion with regard to these approvals.

This Court misapprehended the nature of DOT's approval process when it stated:

Though the approval procedures may appear on the surface to fall within the broad definition of 'licensing' under the Administrative Procedure Act, 5 U.S.C. §§551(8), (9), in reality the procedure involves the performance by DOT of a skilled, but essentially pro forma, act - i.e., determining whether, on the face of an application, a foreign manufacturer has shown the capability for meeting specifications relating to testing and analysis. Slip op. at 2850-51.

We can find no law supporting this Court's conclusion that "a skilled, but essentially pro forma act" cannot be a license. A comparison between the "approvals" in New York X-Ray and those herein makes clear that this Court has reversed itself on the issue of what constitutes a license. A rehearing is necessary in order to restore uniformity to the decisions of this court on this question.

ARGUMENT

I. The DOT Approvals To Inspect Or Test Compressed Gas Cylinders Are "Licenses" Within the APA Definition, 5 U.S.C. §551(8).

The DOT approvals to inspect or test compressed gas cylinders are "licenses" within the APA definition, 5 U.S.C. §551(8); and this Court's determination to the contrary is a clear error of law. The question of whether these approvals are licenses was not at issue between the parties. The Government conceded this point throughout its pleadings in this litigation. Such concessions appear in the Government's brief in the district court and in its brief to this Court.^{5/} This concession also is implicit in the Government's analysis of New York X-Ray, supra, where in analyzing the language of 5 U.S.C. §558(c), the Government quoted the language of the House Report on "licenses",^{6/} and the Government refers to the DOT procedures as "license approval"^{7/} and "initial license applications."^{8/}

Judge Pollack in his opinion for the district court acknowledged that these approvals are licenses. For example, he described DOT's approval

^{5/} Memorandum of Law of Defendants in Opposition to Motion for Preliminary Injunction and In Support of Motion to Dismiss, at 2; JA 3.

^{6/} Brief for Appellees at 4.

^{7/} Id. at 14.

^{8/} Id. at 16.

^{9/} Id. at 19.

procedures as "regulations pertaining to its licensing procedure." ^{10/}

(Emphasis added)

The legislative history of the APA (quoted above) reveals that the definition of "license" was intended to be broadly construed. In addition, there is a body of case law supporting broad construction. ^{11/}

This Court, in New York X-Ray, supra, has held that similar approvals are licenses. It now reverses itself in this case, however, by stating "we perceive little difference between DOT's function in granting 'approvals' and its function to receive registration statements and monitor procedures under §1805 [of the HMTA]." (Slip op. at 2854) The crucial difference is that DOT does not

^{10/} Judge Pollack's opinion JA 137. Judge Pollack also employs the phrases "approval of a license" (JA 136), "prospective licensee" (JA 137), and "agency action in licensing strangers to the plaintiff" (JA 134), in discussing the approval process.

^{11/} See e.g., Pan-Atlantic SS. Corp. v. Atlantic Coast Line R. Co., 353 U.S. 436 (1957) (license includes temporary authority granted by ICC under §311(a) of the Interstate Commerce Act); Schwebel v. Orrick, 153 F. Supp. 701 (D.D.C. 1957) (license includes right to practice before a governmental agency); John E. Merrifield Common Carrier Application, 2 Ad. L. 2d 873 (ICC, 1952) (license includes application for common carrier operations); New York Central R. Co., 282 ICC 283 (1952) (application for permission to abandon a portion of a railroad line is an application for an initial license); North American Co., 3A Ad. L. 46b. 31-1 (SEC 1948) (application by registered holding company and its subsidiary for approval by SEC of proposed reclassification of common stock constitutes rule-making on applications for initial licenses); Joseph E. Seagram and Sons, Inc. v. Dillon, 16 Ad. L. 2d, 642 (U.S. App. D.C. 1965) (under APA, process of issuing a certificate of label approval in accordance with the Federal Alcohol Administration Act is a licensing procedure).

have to approve a registration statement before a manufacturer can ship cylinders in the United States. DOT's receipt of a registration statement does not of itself authorize DOT (or the manufacturer) to do anything. In contrast, the approvals at issue herein are prerequisites to a foreign manufacturer's shipping cylinders to the United States, and they authorize testing and inspection of compressed gas cylinders outside the United States. These approvals are analogous to the license involved in Blackwell College of Business v. Attorney General, 454 F. 2d 928 (D.C. Cir. 1972) (also cited in New York X-Ray). The Court stated in Blackwell that the approved status of the college was "a valuable asset in the nature of a license . . . " (Id. at 932) because without such an approval, the college could not be attended by nonimmigrant alien students. Without these DOT approvals, a foreign manufacturer cannot ship cylinders to the United States. This Court should bring its decision in this case in line with its decision in New York X-Ray which cited Blackwell College with approval.

II. Licenses or Not, These Approvals Are Sanctions Within §558(b) Of The APA And Thus Are Not Authorized By DOT's Grant of General Rulemaking Authority In Section 1804(a).

Even if such approvals were not licenses, they are sanctions within §558(b) of the APA, which provides:

A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

The legislative history states:

This subsection embraces both substantive and procedural requirements of law. It means that agencies may not undertake anything which statutes or other appropriate sources of authority (such as treaties) do not authorize them to do. Where these sources are specific in the authority granted, no additional authority may be assumed. Where these sources are general, no authority beyond the generality granted may be exercised. In particular, agencies may not impose sanctions which have not been specifically or generally provided for them to impose. Thus, an agency which is authorized only to issue cease-and-desist orders may not set up a licensing system; and conversely a licensing authority may not assume to issue desist orders. A rulemaking authority may not undertake to adjudicate cases and vice-versa. ^{12/}

Section 1804(a) of the HMTA, which is a grant of general rulemaking authority, does not authorize DOT to issue these approvals. ^{13/} A general grant of agency authority may be construed only generally, so the power to issue such sanctions cannot be implied from the language of §1804(a). The many specific sanctions which DOT may use to enforce its rules are set forth

^{12/} Senate Report on Administrative Procedure Act, S. Rep. No. 752, 79th Cong. 1st Sess., (1945) Pike and Fischer at Stat. 34. The same language appears in the House Report, H. Rep. No. 1980, 79th Cong. 2d Sess., (1946); Pike and Fischer at Stat. 81.

^{13/} Section 1804(a) of the HMTA provides:

The Secretary may issue, in accordance with the provisions of section 553 of Title 5 including an opportunity for informal oral presentation, regulations for the safe transportation in commerce of hazardous materials. Such regulations shall be applicable to any person who transports, or causes to be transported or shipped, a hazardous material, or who manufactures, fabricates, marks, maintains, reconditions, repairs, or tests a package or container which is represented, marked, certified, or sold by (continued on page 13)

in other sections of the HMTA, but none of those sections authorize the secretive licensing procedures used by DOT to issue these approvals.

III. Public Policy Considerations Support The Public's Right To Participate In DOT's Licensing Procedures.

A. Participants Would Not Invade DOT's Exclusive Domain.

Public policy considerations support the public's right to participate in DOT's licensing procedures. ACMC or any other members of the public who would choose to comment are no more injecting themselves into the exclusive sphere of DOT than an amicus curiae usurps the authority of this Court. Like an amicus curiae whose information aids the court in its decision-making process, public commenters aid an agency in making its determinations without becoming involved in the actual decision-making. If, after reading the comments submitted by participants, DOT finds them helpful, then the agency has been benefited by the public's exercise of its right to participate.

B. Competitors As Well As Other Interested Persons May Bring To An Agency's Attention Errors in the Licensing Process.

The law is clear on the right of a competitor to challenge an agency's grant of a license. The Supreme Court has recognized the benefits which may

13/ (cont'd)

such person for use in the transportation in commerce of certain hazardous materials. Such regulations may govern any safety aspect of the transportation of hazardous materials which the Secretary deems necessary or appropriate, including, but not limited to, the packing, repacking, handling, labeling, marking, placarding, and routing (other than with respect to pipelines) of hazardous materials, and the manufacture, fabrication, marking, maintenance, reconditioning, repairing, or testing or a package
(cont'd p. 14)

accrue from permitting competitors to comment on a license application. In construing the intent of Congress in granting the right of appeal of the issuance of an FCC license to any aggrieved or adversely affected person, the Court explained that:

[O]ne likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license. Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S., 470, 477 (1940).
(Emphasis added)

Moreover, the right to comment accrues to the public -- including foreign regulatory authorities, foreign cylinder manufacturers, cylinder users, importers, unions, and others -- not merely to APMC's members. Therefore, the benefit from public comments cannot be evaluated by focussing only upon comments made by APMC members.

C. Affording the Public the Right to Participate Would not be Burdensome.

There is nothing in the record to indicate that DOT would be overburdened by comments. As of September 9, 1977, nine foreign manufacturers and eight inspection agencies (three of which apparently are domestic) had applied for licenses; six manufacturers and seven inspection agencies had been inspected by DOT. (JA 35a). Thus, DOT has not been overwhelmed with applications nor does the speed

13/ (cont'd)

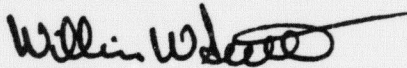
or container which is represented, marked, certified, or sold by such persons for use in the transportation of certain hazardous materials.

with which it has acted upon them indicate that it considers the applications urgent. The record does not suggest that DOT would be overburdened either in terms of volume or cost by permitting public comment on the applications under procedures set forth in Sections 1806 or 1808(a) of the HMTA.

CONCLUSION

Because this Court should promote uniformity among its decisions, because the issue of whether these approvals are licenses has not been briefed by the parties, because the approval procedures at issue herein require a grant of specific statutory authority to the agency, and because sound public policy supports public participation in the approval process, ACMC respectfully petitions the Court for rehearing of this matter.

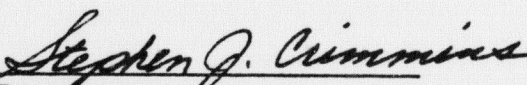
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May 12, 1978

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 544—September Term, 1977.

(Argued January 18, 1978 Decided April 28, 1978.)

Docket No. 77-6172

AMERICAN CYLINDER MANUFACTURERS COMMITTEE,

Plaintiff-Appellant,

—against—

DEPARTMENT OF TRANSPORTATION, BROCK ADAMS, as Secretary of Transportation, JOHN J. FEARNSIDES, as Acting Director, Materials Transportation Bureau, ALAN I. ROBERTS, as Acting Director, Officer of Hazardous Operation, and ENGINEERING PRODUCTS OF CANADA, LTD.,

Defendants-Appellees.

Before:

MOORE, SMITH and MANSFIELD,

Circuit Judges.

Plaintiff appeals a decision of the United States District Court for the Southern District of New York, Honorable Milton Pollack, *Judge*, that the Department of Transportation may lawfully permit foreign manufacturers to test compressed gas cylinders outside the United States without first inviting plaintiff to participate in its decision.

Affirmed.

RICHARD E. SCHWARTZ, Esq., Washington, D.C.
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Esq. Reboul, MacMurray, Hewitt, Maynard
& Kristol, New York, N.Y. for Defendant-
Appellee Engineering Products of Canada).*

MOORE, *Circuit Judge:*

Plaintiff, the American Cylinder Manufacturers Committee ("ACMC"), an unincorporated domestic trade association, appeals the district court's decision that defendants, the Department of Transportation ("DOT") and its officials, can grant approval to foreign manufacturers to have compressed gas cylinders analyzed and tested outside the United States without public participation. We affirm.

Since 1922, federal regulations have governed the manufacture and transportation of compressed gas cylinders used in interstate commerce. Initially, the Interstate Commerce Commission enforced the applicable federal regulations. In 1967, the regulatory authority was transferred to the then-newly-created DOT. 49 U.S.C. §1655. Under the regulations then (and now) in effect, all cylinders used in domestic commerce must be inspected, tested, and

chemically analyzed to determine whether they satisfy cylinder specifications designed to ensure the public safety.

Prior to 1976, all cylinders had to be tested and analyzed within the United States (though the rule did not specify who was to perform the tests). This "domestic test and analysis rule", as it came to be known, was intended to protect American citizens against the dangers of cylinders of uncertain "pedigree". 41 Fed. Reg. 18412 (May 4, 1976). Unlike testing and analysis, however, the *inspection* of cylinders could be performed abroad: high-pressure cylinders had to be inspected by "disinterested inspectors"—i.e., persons not employed by the manufacturer; low-pressure cylinders could be inspected by employees of the manufacturer.

In 1971, the Material Transportation Bureau, an agency of DOT authorized to promulgate regulations in this area, initiated rule-making proceedings by publication of notice, 36 Fed. Reg. 838 (Jan. 19, 1971), to the effect that a change in the "domestic test rule" was being contemplated. In 1976, after extensive proceedings in which ACMC actively participated, a new rule was promulgated. The rule allows DOT-approved foreign manufacturers to test and analyze their cylinders outside of the United States. In addition, the rule requires that domestically-made high-pressure cylinders and foreign-made high- and low-pressure cylinders be subjected to inspection by DOT-approved independent inspection agencies. Thus, under the post-1976 rules, *all*—not just high-pressure—foreign-made cylinders, are subject to independent inspection, and independent inspectors, both foreign and domestic, must be approved by DOT. 49 C.F.R. §173.300a; 41 Fed. Reg. 18414.

Under the new regulations, a foreign manufacturer seeking to conduct tests and analyses outside the United States must submit detailed information concerning its facilities

and its cylinders, and it must identify its independent inspection agency, permit inspection of its manufacturing and testing facilities, and provide materials for independent analyses and tests upon request. If, on the basis of such information and investigation, DOT determines that the manufacturer can satisfy performance standards, then approval will be granted. 49 C.F.R. §173.300b; 41 Fed. Reg. 18413. Application for approval by both inspectors and manufacturers is made to the Office of Hazardous Materials Operations ("OHMO"), a subagency of DOT charged with enforcing the regulations for the transportation of hazardous materials.

Pursuant to the 1976 amendments and the procedures promulgated thereunder, 49 C.F.R. §173.300a and b, OHMO, on August 31, 1977, issued an "approval" for non-domestic testing and analysis to Engineering Products of Canada, Ltd. ("EPC"), a Canadian manufacturer of gas cylinders, and an "approval" to Warnock Hersey Professional Services, Ltd., EPC's independent inspection agency. In September 1977, OHMO issued approvals to another manufacturer and its independent inspection agency. OHMO is presently considering applications for other approvals. This has led to the instant suit.

ACMC brought this action seeking declaratory and injunctive relief: it asks that the approval of EPC's non-domestic testing, and all similar approvals of foreign manufacturers and inspection agencies, be declared void; and that DOT be enjoined from issuing any further approvals unless notice and an opportunity for public comment is first provided. After a trial on the merits, District Judge Pollack denied relief, finding that neither notice nor a hearing was required under the Administrative Procedure Act, 5 U.S.C. §558(c), or under the Hazardous Materials

Transportation Act of 1974 ("HMTA"), 49 U.S.C. §1801 *et seq.*, DOT's enabling statute.

On appeal, ACMC argues that DOT approvals are, in effect, "licenses" to analyze, test, or inspect cylinders outside of the United States. These "licenses", it is contended, serve to enforce compliance with DOT's safety regulations and are, therefore, like compliance orders, the issuance of which, under 49 U.S.C. §1808(a), must be preceded by notice and an opportunity for public comment. ACMC argues that, though the approval or license procedures may have been validly enacted under DOT's rule-making authority, HMTA §1804(a), the *implementation* of the procedures can only be justified under §1808(a), which as noted, requires an opportunity for public comment before a compliance order is issued.

As did the district court, we assume ACMC's standing to raise its claims, though it is somewhat doubtful that ACMC's status as a competitor of the foreign manufacturers constitutes a sufficient predicate on which its standing can be upheld. Assuming standing, however, we affirm on the merits.

We reject ACMC's contention that, if the approval procedure is valid at all, it is only so under §1808(a). As the district court noted, §1808(a), which is reproduced in the margin,¹ deals only with "orders directing compliance",

¹ 49 U.S.C. §1808(a) provides:

(a) The Secretary is authorized, to the extent necessary to carry out his responsibilities under this chapter, to conduct investigations, make reports, issue subpoenas, conduct hearings, require the production of relevant documents, records, and property, take depositions, and conduct, directly or indirectly, research, development, demonstration, and training activities. The Secretary is further authorized, after notice and an opportunity for a hearing, to issue orders directing compliance with this chapter or regulations issued under this chapter; the district courts of the United States shall have jurisdiction, upon petition by the Attorney General, to enforce such orders by appropriate means.

which are intended as a sanction for past violations of DOT regulations. DOT decisions to grant or withhold approvals, on the other hand, involve determinations whether cylinder specifications can be met in the first instance. They are, in effect, mechanisms designed to *effectuate* the safety standards promulgated by DOT. Thus, they do not fall within the ambit of §1808(a).

We disagree with appellant's contention that the procedures now contested cannot be justified under DOT's general rule-making powers granted in §1804(a),² for, as we see it, the procedures reflect merely a method for policing the regulations lawfully adopted under that provision. We believe that ACMC's repeated claims that such procedures involve "licensing" are an exaltation of form over substance.

When one studies the substance of the 1976 rules and their genesis, it becomes apparent that, though the "approval" procedure may appear on the surface to fall within the broad definition of "licensing" under the Administrative Procedure Act, 5 U.S.C. §§551(8), (9), in reality the procedure involves the performance by DOT of a skilled, but essentially pro forma, act—i.e., determining whether, on the face of an application, a foreign manufacturer has shown the capability for meeting specifications relating to testing

2 49 U.S.C. §1804(a) provides:

"(a) The Secretary may issue . . . regulations for the safe transportation in commerce of hazardous materials. Such regulations shall be applicable to any person who transports, or causes to be transported or shipped, a hazardous material, or who manufactures, . . . repairs, or tests a package or container which is represented, marked, certified, or sold by such person for use in the transportation in commerce of certain hazardous materials. Such regulations may govern any safety aspect . . . which the Secretary deems necessary or appropriate, including, but not limited to, the packing, . . . handling, labeling, marking, . . . and routing . . . of hazardous materials, and the manufacture, . . . [and] testing of a package or container . . .".

and analysis. That the procedure serves this limited function can be seen from its origin: proceedings for changing the nearly fifty-year-old "domestic test and analysis rule" were begun in 1971 in response to the realization that, with the advancements being made in the industry's technology, and with the advent of speedy travel and communication systems, thus facilitating the worldwide exchange of scientific information, it would no longer be realistic to assume that our neighbors in Canada, and perhaps elsewhere, did not have the technological capacity to manufacture, test, and analyze cylinders in accordance with DOT specifications. See 41 Fed. Reg. 18412-13.³ Hence, DOT promulgated the rule that, upon submission of an application indicating that a foreign manufacturer had the requisite competence to meet safety requirements, testing need not be conducted in the United States. The new rule puts to rest the anachronistic presumption that only domestic manufacturers, such as the members of ACMC, can satisfy DOT's requirements.

With the removal of the presumption, a method had to be devised, of course, to determine which manufacturers possessed the capacity to meet specifications, and which did not. Thus, DOT created a procedure inviting foreign manufacturers to submit information and requiring them to permit, as well as finance, DOT inspections. It would be strange indeed if DOT, while charged with the duty of protecting the American public from the dangers of transporting hazardous substances, was permitted to make regulations in conformance with the industry's capabilities, but was

³ Furthermore, under the old "domestic" rule, because of the cost, inconvenience, and delay it imposed with respect to foreign manufacturers, such manufacturers were almost completely excluded from the American market, in effect making DOT a *de facto* regulator of foreign commerce—a power well outside DOT's Congressional mandate. See 41 Fed. Reg. 18413.

denied the power to administer the regulations which properly and validly carry out this charge. We believe, as the Supreme Court has stated, that "administrative agencies and administrators [are] familiar with the industries which they regulate and [are] in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved". *FCC v. Schreiber*, 381 U.S. 279, 290 (1965). Common sense dictates that, in a case such as this, the agency must also have the authority to oversee the application of its regulation. As Judge Friendly has put it, "Congress could hardly have intended to deprive [this] agenc[y] of [its] ability to administer." *WBEN, Inc. v. United States*, 396 F.2d 601, 617 (2d Cir.), *cert. denied*, 393 U.S. 914 (1968).

Indeed, the statutory scheme of HMTA, when considered as a whole, indicates quite clearly that Congress fully intended to provide DOT with the authority to police its regulations in order to assure the public safety, and to oversee the manufacturers in the industry without the necessity of resorting to the harsh sanction of a compliance order, §1808(a)⁴ and without the intervention of competitors in the industry. Only when DOT finds violations, or permits a manufacturer an exemption from the exacting specifications otherwise applicable, §1806,⁵ is the public given an oppor-

4 See n.1, *supra*.

5 49 U.S.C. §1806(a) provides:

(a) The Secretary, in accordance with procedures prescribed by regulation, is authorized to issue or renew, to any person subject to the requirements of this chapter, an exemption from the provisions of this chapter, and from regulations issued under section 1804 of this title, if such person transports or causes to be transported or shipped hazardous materials in a manner so as to achieve a level of safety (1) which is equal to or extends that level of safety which would be required in the absence of such exemption, or (2) which would be consistent with the public interest and the policy of this chapter

tunity to participate under the statutes. Thus, under §1805⁶ of HMTA, DOT, without holding public hearings, is given the authority to set minimum levels and to establish criteria

in the event there is no existing level of safety established. . . . Each person applying for such an exemption or renewal shall, upon application, provide a safety analysis as prescribed by the Secretary to justify the grant of such exemption. A notice of an application for issuance or renewal of such exemption shall be published in the Federal Register. The Secretary shall afford access to any such safety analysis and an opportunity for public comment on any such application,

6 Section 1805 gives the Secretary broad powers, as follows:

(a) The Secretary is authorized to establish criteria for handling hazardous materials. Such criteria may include, but need not be limited to, a minimum number of personnel; a minimum level of training and qualification for such personnel; type and frequency of inspection; equipment to be used for detection, warning, and control of risks posed by such materials; specifications regarding the use of equipment and facilities used in the handling and transportation of such materials; and a system of monitoring safety assurance procedures for the transportation of such materials. The Secretary may revise such criteria as required.

(b) Each person who transports or causes to be transported or shipped in commerce hazardous materials or who manufactures . . . or tests packages or containers which are represented, marked, certified, or sold by such person for use in the transportation in commerce of certain hazardous materials (designated by the Secretary) may be required by the Secretary to prepare and submit to the Secretary a registration statement not more often than once every 2 years. Such a registration statement shall include, but need not be limited to, such person's name; principal place of business; the location of each activity handling such hazardous materials; a complete list of all such hazardous materials handled; and an averment that such person is in compliance with all applicable criteria established under subsection (a) of this section. The Secretary shall by regulation prescribe the form of any such statement and the information required to be included. The Secretary shall make any registration statement filed pursuant to this subsection available for inspection by any person,

(c) No person required to file a registration statement under subsection (b) of this section may transport or cause to be transported or shipped hazardous materials, or manufacture . . . or test packages or containers for use in the transportation of hazardous materials, unless he has on file a registration statement.

for the type and frequency of inspections. Furthermore, §1805 expressly authorizes the Secretary to establish "a system of monitoring safety assurance procedures. . . ." And, under §1805, DOT may require that *any* manufacturer submit a registration statement providing information to indicate that its requirements are met. Furthermore, DOT is authorized to conduct inspections to determine whether individuals are complying with its regulations. HMTA §1808(a). See note 1, *supra*. Appellant's position would imply that DOT cannot carry out its functions under these provisions without the aid of others in the industry who are not charged with the public duty. A decision by DOT that a manufacturer *has* met specifications, which is the function of an approval, does not implicate a *lowering* of standards that must be met by a manufacturer, which is a situation about which the public might reasonably be concerned. Indeed, we perceive little difference between DOT's function in granting "approvals" and its function to receive registration statements and monitor procedures under §1805.

To hold, as ACMC would have us do, that its members should be permitted to oversee DOT in accepting and approving applications submitted by foreign manufacturers would be to involve an applicant's competitors in the day-to-day administration of DOT's regulations vis-a-vis that applicant. Such involvement is not only unrequired by the statutes and regulations, but it is unwise as well. The public duty lies with DOT, not with ACMC—and it must be presumed that that agency will carry forth its duties with the skills and expertise it possesses. It has not been alleged that DOT has failed in its duty, nor that unsafe foreign cylinders are entering or will enter the country because of the new rule. The public interest will not be well served by needlessly prolonging agency proceedings

and adding unnecessary costs to the implementation of DOT's procedures created to meet the changing needs of the industry, especially where, as in this case, there is no threat to the public safety. We thus hold that DOT may conduct its business in this regard without being required to accept ACMC's assistance.

The decision of the district court is affirmed.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause in accordance with Rule 5, Federal Rules of civil Procedure, on this 12 day of May, 19 78

LORD, DAY & LORD

By Stephen J. Crimmins, Atty.

